

**U.S. Department of Labor**

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**Issue Date: 24 August 2006**

CASE NO.: 2006-LDA-00045

OWCP NO.: 02-142206

In the Matter of:

**T. J.**  
Claimant

v.

**UNISYS CORPORATION,**  
Employer

and

**ACE INSURANCE COMPANY,**  
Carrier

Appearances:

James F. Norton, Esq. (Law Offices of Jeffrey S. Glassman),  
Boston, Massachusetts for the Claimant

Stephen C. Resor, Esq. (Sullivan, Stoler & Resor),  
New Orleans, Louisiana for the Employer and Carrier

Before: Daniel F. Sutton  
Administrative Law Judge

**DECISION AND ORDER AWARDING BENEFITS**

**I. Statement of the Case**

In May, 2004, T. J. (the "Claimant"), a United States citizen and resident of Massachusetts, was hired as a field service engineer by Unisys Corporation (the "Employer"), an independent contractor to the United States Army. He was assigned to work in Iraq and began his employment on June 1, 2004. He claims that on August 14, 2004, he strained his back and shoulder while lifting a heavy box off of a helicopter and that this injury has rendered him totally

disabled. TR 29. He filed a claim in this matter seeking worker's compensation benefits under the Defense Base Act, 42 U.S.C. § 1651 et seq. (the "DBA"), and the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 et seq. (the "LHWCA"). The Employer controverted the claim. A resolution was not reached during informal proceedings before the Office of Workers' Compensation Programs ("OWCP"), and the case was referred to the Office of Administrative Law Judges ("OALJ") for a formal hearing pursuant to section 19(d) of the LHWCA.

A formal hearing was held on May 17, 2006 in Boston, Massachusetts. The Claimant appeared, represented by counsel, and counsel appeared on behalf of the Employer. The Claimant and the Employer offered documentary evidence which was admitted without objection as Claimant's Exhibits ("CX") A through K and Employer Exhibits ("EX") A through L. TR 19-21, 68, 103. The Claimant attempted to call an additional witness whose identity was not disclosed prior to the hearing, and the Employer's objection to the appearance of the witness was sustained when the Claimant failed to establish cause for his failure to disclose the witness in accordance with the requirements of the pre-hearing order. TR 136-138.

After analysis of the evidence contained in the record and the parties' arguments, I conclude that the Claimant has established that he is entitled to an award of temporary total disability compensation with interest, medical care and attorney's fees. My findings of fact and conclusions of law are set forth below.

## II. The Claim, Stipulations and Issues Presented

The Claimant seeks an award of temporary total disability compensation commencing on June 20, 2005 and continuing. TR 9. He also seeks an award of appropriate medical care. At the May 17, 2006 hearing, the parties made the following stipulations: (1) the claim is covered by the DBA and the incorporated LHWCA workers' compensation provisions; (2) an employer/employee relationship existed at all relevant times between the Claimant and Unisys Corporation between August 14, 2004 and June 20, 2005; and (3) as of the date of the hearing, the Claimant was still employed by the Employer on an unpaid leave of absence. TR 14-18

The issues in dispute are (1) whether the Claimant's failure to give notice of his injury to the Employer until February 13, 2005, approximately six months after his injury, resulted in unfair prejudice to the Employer by preventing the Employer from investigating the circumstances surrounding the Claimant's injury; (2) whether the Claimant's injury and disability arose out of and in the course of his employment with Unisys Corporation; (3) the nature and extent of the Claimant's disability; and (4) how the Claimant's average weekly wage (AWW) should be calculated for purposes of determining his compensation rate.

### III. The Evidence

#### A. The Claimant's Testimony and E-mail Correspondence

The Claimant was hired in May, 2004 by Unisys Corporation as a field service engineer. TR 27. He began training for this position on June 1, 2004 in Reston, Virginia. Id. On July 17, 2004, he began his trip to Iraq. He spent some time at Dohar base in Kuwait for further training and in Baghdad before his arrival in Mosul and Habur Gate by helicopter. TR 28. According to the Claimant, on August 14, 2004, as he was unloading the helicopter in Mosul, Iraq, he and another person slid a box out that was heavier than he anticipated, and when he was getting off the helicopter he strained his back and shoulder. TR 29. That night and the next morning the pain in his shoulder "got really bad" and his back was "mediocrely sore." Id. He described the pain as "like a tear or a rip in the shoulder from the extra weight" and "a little twinge" in the lower part of his back. TR 30. The Claimant thought that he had a strain or a sprain and that it would improve with time. TR 29. The next morning, the Claimant went to the base hospital to have his shoulder checked. TR 30. The doctors there took an x-ray, gave him some Flexeril, and told him to come back if the pain worsened. Id. He did not report that he had a back injury at that time because he had had back conditions before and thought he only had a strain that would heal in "a week or two or a month." TR 31.

The next day, on August 16, the Claimant took a convoy to Habur Gate, which was his final work assignment destination. Id. Upon their arrival, he and others set up their work station, which the Claimant described as a long process. TR 32. It was a ground unit connected to a computer that would keep track of vehicles that passed by. Id. It was designed to identify cargo by radio frequency using tags placed on the vehicles and the cargo. TR 33. The Claimant had to perform routine maintenance, check on the system several times a day to be sure that it was working properly, and report to Unisys. Id. He was on call 24 hours per day, 7 days a week. TR 34. He would typically walk back and forth from where he was living to the job site four to six times a day. Id. In the beginning his walk was a mile or a mile and a half to the working site, but the site was moved to a quarter mile from where he was living due to power failures at the previous site. Id. Each time that he went to the site he carried his equipment 20 to 30 minutes along a road that was mostly tarred with some dirt. TR 35. Once he arrived to the site he worked in a metal box that was on the ground. Id. He also had an office in the same building as his residence where he would do paperwork and work on the computer. His office, the mess rooms and the bathrooms were on the fourth floor of the building. Id. His bedroom was on the second or third floor. Id. He was not assisted or directed by other Unisys employees during his time at Habur Gate. TR 37. Acting First Sergeant Patrick Dove sat near him in his office. TR 36. Sgt. Dove and other army officials were there to move fuel trucks in and out of Iraq, through Turkey and into Baghdad. TR 37.

The Claimant testified that he had always worked through pain to the point where he "couldn't do anything" and that in Iraq, he continued to hope that his condition would improve. TR 37-38. The Claimant stated that the nearest medical facility from Habur Gate was in Mosul, which was a four hour convoy ride away. TR 38. He went to Mosul twice, once to pick up supplies and once to see a doctor. Id. In September or October he went to see Sgt. Tighe, one of

the medics assigned to the site, who prescribed Naprosyn and more muscle relaxants. TR 38-39. He said that his back at that point felt “not too bad” but that he had not noticed any improvement. TR 39. He said that he went to see Sgt. Tighe every other day. Id.

On Christmas Eve, the Claimant went to London for five days where he met with his wife. Id. He stated that his back at this point was feeling sore, but that he did not seek medical treatment because he did not think that his insurance would cover it. TR 39-40. He testified that on his way back he stopped to see the medics in Mosul, who said that he should be treated. TR 40. Upon his return to Habur Gate his back continued to worsen to the point that he “could hardly walk.” Id. By the beginning of February he started e-mailing his supervisor in Kuwait, “pleading” for vacation time so that he could go home for medical treatment. Id. He states that for the next month he was continuously told that he would have to wait until someone came to replace him and that he was getting “the run-around.” TR 40-42.

The Claimant testified that he had to work between March 13 and 16 and that he was not allowed to leave his post. TR 42-43. He said that on March 16 he had gotten to the point where he “couldn’t stand the pain any longer.” TR 43. He went to Mosul, where doctors conducted an x-ray and agreed that he had to leave. Id. He arrived in the United States on March 19. Id. The only person at Unisys to whom he had reported his condition between his arrival and early February was his co-worker, Brendan Martinez, who was a field service engineer who had been at Habur Gate in August for one week to help him set up. TR 41-42.

According to the Claimant, he directly reported to Rodney Farmer, who was located in Kuwait. TR 41. He stated that the only time that he saw Mr. Farmer during the course of his employment in Iraq was in July, and that after that they communicated by phone and by e-mail. Id. He stated that he had never met Captain Gregory Smith, nor had he had any conversation or dealings with him during the course of his employment. TR 43-44. He testified that he did know Major Rodney Jordan, who was located in Baghdad with a Unisys employee Dan Moses and was in charge of the RFID project in Iraq, to which the Claimant had been assigned. TR 44. The Claimant stated that Mr. Moses was supposed to be his first contact but that he was often not there and did very little to answer his questions or provide assistance. TR 45. The Claimant stated that he had experienced equipment problems and requested a computer for three months from October 2004 to the end of December when the computer finally arrived. Id.

The Claimant testified that Major Jordan criticized his work performance based on his inability to file reports on the equipment at Habur Gate. TR 47. However, he stated that his failure to submit the reports was due to equipment that had been burnt out in October as a result of multiple power shortages. Id. Once the new equipment arrived, he had to get a device that worked as a surge protector. TR 47-48. According to the Claimant, he sent daily e-mails to Mr. Moses requesting that the equipment be sent. TR 48. He claims to have had no conversations with Major Jordan regarding his work performance during this time. Id. On April 11, 2005, Major Jordan sent an e-mail to Mr. Farmer which stated that the Claimant refused to send in daily reports and keep Mr. Moses informed of the status of the RFID site. TR 49. According to the Claimant, he sent in the report whenever he could, but that he was often unable to send them due to problems with the internet. Id. He said that he informed Mr. Moses of the problems with the internet and repeatedly requested phone numbers for Mr. Moses, Mr. Farmer, and Major

Jordan via e-mail and satellite phone with no success. Id. Regarding Major Jordan's contention that he refused to take the initiative to improve his site or increase the ITV of his work area, the Claimant states that the power outages prevented him from making improvements. TR 50. He claims to have reported these problems to Mr. Farmer, Mr. Moses and Major Jordan. Id. Although Major Jordan often wrote that the Claimant would leave his location on personal missions, according to the Claimant, he did not know that he needed permission to leave Habur Gate and no one ever criticized him for doing so. TR 50-51. Major Jordan also criticized the Claimant for failing to be proactive about repairing and requesting replacement parts for his site. TR 51. The Claimant stated that he repeatedly requested parts and replacement from Mr. Moses and Mr. Farmer without success and went so far as to write to Jim Hayes, the project lead in the United States. TR 51-52. The Claimant testified that in November of 2004 Mr. Rodney criticized his work performance but he responded that he did not have the equipment he needed to successfully complete his responsibilities. TR 52. According to the Claimant, Mr. Rodney's response was that he would get the equipment for him. TR 53. According to the Claimant, he did not hear any complaints about his job performance after the November conversation. Id.

Within a week of returning to the United States, the Claimant went to see Dr. Mahoney, who had been his neurologist since before a surgery he had in 1999. Id. He testified that he had seen Dr. Mahoney on several more occasions leading up to the hearing, but that he had been unable to diagnose his back or shoulder problems without further testing. TR 54. He was unable to run the tests due to the cost and the termination of his temporary disability coverage. Id. The Claimant had had several MRIs since having returned from Iraq but he was unsure who paid for them. Id. At the time of the hearing, he was covered by his wife's health insurance. Id. He stated that Dr. Mahoney had recommended physical therapy and acupuncture. TR 55. Dr. Mahoney had prescribed medication, specifically Tylenol with codeine, but the insurer that he had been using was unwilling to cover it. TR 55, 58. His insurer also refused to cover physical therapy and acupuncture. TR 59. He claimed that this same insurer, which he thought was the insurer for Unisys, had been covering his physical therapy and prescription medications for five or six months. TR 57.

The Claimant had lower lumbar surgery in 1999. TR 61. His surgeon, Dr. Warren, had been referred by Dr. Mahoney. Id. The Claimant had started seeing him in December of 1998 and had continued seeing him until around October of 1999. Id. Dr. Warren's reports from March of 2000 following his surgery indicated that the Claimant had reported "excellent progress," that he was doing "extremely well," and that he was to be seen again as needed. TR 62. He never returned to see Dr. Warren. Id. The Claimant reported that in 2001 he experienced numbness in his hands due to neck problems and that Dr. Latchaw took a piece of the Claimant's hip and replaced one of the disks in his neck. TR 63. He stated that "right away" he felt relief, and although he felt some pain in his shoulders for three or four months, Dr. Latchaw told him that it was probably the nerve regenerating and that it would go away. Id. The Claimant said the pain did go away and that he has been fine ever since. Id. The treatment from Dr. Latchaw was primarily for his right shoulder. Id. He did not see Dr. Latchaw after March 27, 2002. Id. The Claimant's injury in Iraq was to his left shoulder, and he reported never having experience pain to his left shoulder prior to this, or to his back after March of 2002. TR 64.

After the Claimant's 1999 back surgery until March of 2003 he worked for Arc and other contract agencies as a computer technician. Id. In this position, his job required that he disconnect, box, and move computers, which would involve crawling under desks. TR 65. He did not require treatment for his back at any time while employed at Arc. Id. Beginning in March of 2003, he worked for one year as a mechanic for Bear Cove Automotive. TR 64. To complete his work he was required to stand, bend, lift and twist. TR 65. He described the job as "very demanding" physically and stated that he did not have any treatment for his back or shoulder during that time. TR 65-66.

According to the Claimant, he did experience back problems "from time to time," which he described as a "twinge" that was easily treated with an ice pack and a day of rest. TR 66. After his surgery he would go in to see Dr. Mahoney "once in awhile" for a check-up. Id. Before he left for Iraq, Dr. Mahoney told the Claimant that he did not need to see him again unless he experienced a problem. Id.

When the Claimant applied for a job at Unisys, he was required to undergo a physical examination, which was conducted by his primary doctor, Dr. Gomes. Id. At the request of his insurer, he also saw Dr. Gibbons, who saw him for 15 or 20 minutes and looked at his back "twice," but did not perform any tests. TR 67. He stated that after he reported his injury to Unisys, he was not assigned light duty work. Id. He described his job at Habur Gate as light duty "at times" and not at other times. TR 68.

On cross-examination, the Claimant testified that he did not tell the emergency room staff in Mosul 24 hours after he claims to have injured himself that he had hurt his back in addition to his shoulder. TR 70. He was prescribed Tylenol with codeine, as he had been prescribed after his 1999 surgery. TR 71-72. There was an x-ray of his shoulder that was negative for fracture or dislocation. TR 72. Although he told the emergency room staff about his prior surgery, there was no mention in the description of his treatment and diagnosis of an aggravation of that injury. Id. They diagnosed him with left deltoid muscle strain, prescribed Naprosin and Flexeril and he was discharged. TR 73. He was in Mosul until August 16, but did not seek further medical attention before leaving for Habur Gate. TR 73-74.

The Claimant testified that he continued working from August 17, 2004, until Christmas and that he did not report his injury to Unisys until February of 2005. TR 74-75. He admitted that he did not try to see a doctor in London, nor did he return to the hospital where he was first treated in Mosul, despite passing through the city three to five times. TR 75-76. He said that he told Dr. Gibbons, who had performed an independent medical examination on February 28, 2005 and Dr. Mahoney, when he returned to the United States in March of 2004 that he had injured his back while unloading a helicopter, however, he did not mention any back injury to the doctor in Iraq whom he saw the day after he was injured. TR 76-77. He said that he was not told until "afterwards" that the Army wanted him terminated, and that he was "led to believe" that his termination was due to the fact that the Army did not want him working for them if he was injured. TR 77-80. However, he agreed that he sent an e-mail dated March 7, 2005 to his immediate supervisor, Mr. Farmer, asking for clarification regarding the reason for his dismissal from the Habur Gate assignment. TR 78-79.

When the Claimant was questioned further about his 1999 back surgery, he described the procedure as a removal of a disc that was then replaced with two titanium pins and bone putty. TR 83. He stated that the pins and bone putty were still in his back. Id. Although the Claimant had testified that he had no problems after recovering from his surgery, a September 30, 1999 note from Dr. Warren that is marked as Respondent's Exhibit C, indicated that the Claimant "was doing reasonably well until two weeks ago when he slipped, stumbled awkwardly, but did not fall. Since that time he's had back pain with intermittent left leg minor radicular pain to the ankle. He continues to use Tylenol and codeine for pain." Id. As stated above, the Claimant testified that he was "doing much better" on and after March 8, 2000, and that he would occasionally see Dr. Mahoney. TR 85.<sup>1</sup>

The Claimant testified that he had had an anterior cervical disc excision on November 11, 2001, where they took bone from his hip and performed a fusion at one level in his neck. TR 87. He stated that he does not remember whether he had the lumbar epidural steroid injections that had been scheduled at Quincy. TR 88.

The Claimant agreed that Dr. Mahoney could be described as a "gatekeeper doctor" who would refer him to another doctor if he required surgery or otherwise prescribe medication. TR 89. He said that Dr. Mahoney mainly prescribed Tylenol with codeine after the surgeries when the Claimant saw him for follow up visits. Id. There were no records for his visits with Dr. Mahoney between 2000 and 2005. TR 90. The Claimant stated that Dr. Mahoney's examinations consisted of EMGs and bending and twisting until he could feel the pain. TR 91-92. He described these examinations as quick. TR 92. He stated that he thinks Dr. Mahoney "relies more on tests," but that he is unable to conduct these until they are covered by the Claimant's insurance. Id. The Claimant said that about one year after each of his surgeries he no longer needed care for that area of the body, but that he would go back to Dr. Mahoney periodically for pain medication. Id.

The Claimant had to discontinue his pain medication prior to leaving for Iraq because the Army told him he would not be deployable as long as he was taking the Tylenol and codeine. TR 93. The Claimant agreed that after an examination upon his return from Iraq, Dr. Mahoney noted the absence of "any pronounced or new neurological deficits in terms of overall motor, sensory or reflex function" and that after a cervical MRI that was done on March 31, 2005, he noted that there was no evidence of new disc herniation, nerve root compression, or compression of the spinal cord. TR 94. The Claimant stated that he was not complaining of any neck problems. TR 95. Regarding MRIs he had after returning from Iraq, he acknowledged that there was no showing of any herniations or recurrent disc and that no surgeries had been recommended. Id. He claimed that the pain he experiences when he stands or sits for long

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<sup>1</sup> It is noted that records dated March 27, 2002 from Dr. Latchaw state,

Low back pain remains problematic with bilateral leg numbness. Left greater than right. He described a numbness and pain along the left proximal lower gluteal region and left proximal lower gluteal region and left posterior lateral thigh and calf...In regards to his lumbar condition, an episodic sciatica, I believe it's reasonable for him to consider undergoing a lumbar epidural steroid injection...

periods is the reason that he is unable to work. TR 96. He conceded that immediately after his injury, on August 14 and 15, he did not report to the medical authorities that he had injured his back while unloading a helicopter. TR 97.

The Claimant admitted that he is the person depicted in the surveillance video that was taken after he had filed his claim for workers compensation benefits. TR 98. He acknowledged that there was footage of his wife carrying a ladder from his truck with him supporting and that he had climbed the ladder and assisted his wife with some roof repair. Id. He was cutting the shingles with a knife and handing the shingles to his wife. Id. He also admitted to carrying metal fencing from his truck to the garage and was able to get on the ground to assemble a grass catcher for a short time. TR 99.

The Claimant acknowledged that none of his doctors or experts in this case has been able to say that he has a new injury post-Iraq, and that the pain he claims to have is the only evidence of an injury. TR 100. He recognized that the insurer for Unisys had stopped paying for his benefits based on the medical records completed by Drs. Mahoney and Gomes which showed no objective signs of injury. TR 101-102. Since that time he has not received any long or short-term disability benefits or worker's compensation benefits. TR 104-105. He admitted that he collected unemployment insurance in the amount of \$534.00 per month for six months beginning June 20, 2005. According to the Claimant, he was actively seeking employment during this time through the internet. TR 105-106. He also retained an attorney to file for social security disability benefits but has not had a hearing on the matter and stated that he is not currently seeking employment for that reason. TR 107.

The Claimant maintained that he was not told that his dismissal was due to his work performance and that he believed it was due to his back problems. TR 110. He admitted that beyond the treatment he received from the medics at Habur Gate, he did not seek medical attention for the seven months between the day after his injury and his return to the United States. TR 113. The Claimant stated that the reason for this is that he did not trust the Army doctors. TR 114.

The Claimant admitted that he sent the following e-mail, to an Army Medic at Habur Gate:

Thanks for any [and] all you will do. My people at Unisys think where we are is like a base. So if you would be as kind as to say that we did talk about the back [and] shoulder [and] your take on the situation [and] any thoughts you had. When the medics that were there before you gave me some muscle relaxers and some anti inflammatory medicine. So where there was no forms I guess what I need is an e-mail stating that you were aware of what was wrong [and] monitoring the meds I was taking [and] doing what you could do to facilitate me moving on to get the medical treatment needed. If you could exaggerate a little bit on the shoulder [and] back it would be extremely helpful. Your friend in Mass.

TR 116-117.

On redirect, the Claimant stated that he had not been told that he had been dismissed or relieved when he left for the United States and for some time after. TR 120. He said that he had stopped taking his pain medication in early July because he had been told that he would be otherwise be non-deployable. TR 121-122. Prior to that time he had been taking “four a day.” TR 122. He said that after his surgery he would go to Dr. Mahoney as needed, approximately once every four or five months, for more pain medication. TR 123-124. The Claimant stated that he had worked for several contracting companies over the years but that he had never filed a worker’s compensation claim prior to this one, including after his back and neck surgeries. TR 125-125. The Claimant stated that the Tylenol with Codeine “takes the edge off” of his symptoms but that he still cannot return to work. TR 134-135. He also testified that the pain he has now is lower than the pain he experienced around the time of his previous surgeries. TR 135.

## B. The Medical Evidence and Opinions

The medical records dated July 26, 1999 following the Claimant’s June 9, 1999 lumbar disc surgery state that the Claimant “reports excellent relief of his back and leg pain. He continues to use Percocet four times a day which he will begin to taper. He is walking comfortably and had discontinued his brace.” EX C at 10. On September 30, 1999 it was noted,

[the Claimant] was doing reasonably well until two weeks ago when he slipped, stumbled awkwardly but did not fall. Since that time he has had back pain with intermittent left leg minor radicular pain to the ankle. He continues to use Tylenol with codeine for pain...He walks with apparent ease. He flexes forward 45 degrees and complains of central back pain...

Id. at 11. On March 8, 2000 the medical records indicate,

[the Claimant] was only able to begin [physical therapy] recently due to insurance problems and report excellent progress. On his own he is stretching and walking up to one mile at a time. He returned to work last August and has been doing well without any meds. He is discharged from follow up to be seen again as needed. He has done extremely well.

Id. at 12.

In July of 2001, Dr. Mahoney referred the Claimant to Dr. John P. Latchaw, a neurosurgeon. EX C at 28. On July 26, 2001, following an initial consultation with the Claimant, Dr. Latchaw described that the Claimant was experiencing numbness in his right arm and leg and along his right lateral neck. Id. These symptoms had begun in April of 2001. Id. The Claimant was also experiencing paresthesias in the third, fourth and fifth fingers. Id. In November of 2001 the Claimant underwent cervical disc surgery. On January 22, 2002, Dr. Latchaw cleared the Claimant to return to work part-time. EX C at 29. He stated that there was “no new neurological deficit.” Id. He ordered outpatient therapy and scheduled a routine post-op

CT scan. Id. On March 27, 2002, approximately four months after the Claimant's surgery, Dr. Latchaw reported,

[The Claimant] described numbness along the left ulnar median distribution. Left lateral strap muscles and trapezius are painful. Pain travels along the distal right forearm mostly in the ulnar distribution. Low back pain remains problematic with bilateral leg numbness, left greater than right. He described numbness and pain along the left proximal gluteal region and the left posterolateral thigh and calf...Despite his problems he is awaiting an opportunity [to] return to some degree of work. He is scheduled to return as a network specialist in desktop computers, and is hopeful that his condition will continue to improve.

EX C at 25.

A medical report dated August 15, 2004, the day after the Claimant's injury in Iraq, states that the Claimant had been carrying a heavy object when he felt his left shoulder "give." CX F. The person who saw the Claimant described that the shoulder was painful upon movement only and that the Claimant had no past history of shoulder problems. Id. She described the pain when he used his arm as "burning pain down to [the] elbow." Id. She ordered an x-ray and prescribed Naprosyn and Flexeril to be used primarily at night. Id. The next medical record is a "sick slip" dated March 17, 2005, in which an Army Medical Officer stated that the Claimant "needs to go back to the US to address back problem. He will likely need surgery." CX G.

#### Dr. John F. Mahoney

Dr. Mahoney has been the Claimant's treating neurologist for the past seven years. CX A1 at 1. He treated the Claimant before each of his past surgeries in 1999 and 2001, and continued to monitor him after the surgeries. Id. He treated and evaluated the Claimant upon his return from Iraq and submitted five reports between April 15, 2005 and April 12, 2006 describing the Claimant's progress. CX A1-CX A6.

#### April 15, 2005 Report

According to Dr. Mahoney, the Claimant's conditions dramatically improved within a year of each of his separate surgeries. CX A1 at 1. By that time he no longer needed physical therapy, chiropractic treatment, or a medication regimen for his neck or back. Id. He described his work activities while in Iraq as involving a good deal of climbing, walking and some lifting. Id. He described how in August of 2004 the Claimant began to feel new onset lumbar pain and cervical pain to a lesser extent. Id. He stated that the Claimant tried to manage his condition with rest and exercises for his neck and back that he had learned around the time of his surgeries, but his pain continued to worsen, extending to his legs, until February of 2005 when the Claimant was forced to return to the United States for medical evaluation. CX A1 at 1-2.

When Dr. Mahoney saw the Claimant in late March of 2005, he did not see any new neurological problems affecting his "motor, sensory or reflex function," but he stated that there was "marked spasm of muscles in the cervical and lumbar area with significant impairment of

overall range of motion.” CX A1 at 2. He further stated that he “had to be concerned about the new onset of pain of a progressive persistent nature with nerve root like symptoms affecting both lower extremities.” Id. Due to this concern, he ordered an MRI of the cervical and lumbar area. Id. The cervical MRI showed no evidence of new disk herniation and no evidence of nerve root compression or other spinal cord compression. Id. He noted that the MRI of the lumbar spine showed no evidence of “new disc herniation affecting impingement or compression on the nerve root structures.” Id. He commented that the results were “most encouraging” but that the Claimant’s symptoms relating to the lumbar spine could require formal neurosurgical consultation, and possibly an evaluation by bone scan, CT Myelography, or EMG testing. Id. He felt it was appropriate to move forward with “an aggressive conservative approach” while continuing to monitor the Claimant’s condition rather than more invasive procedures. Id. He recommended cervical or lumbar blocks to manage the Claimant’s “totally disabling” pain. Id. He continued the Claimant’s regimen of pain medication including Percocet, to be used every 6 hours as needed, a trial of Celebrex once or twice a day, Flexeril as a muscle relaxant, and physical therapy to be used in conjunction with acupuncture. Id. According to Dr. Mahoney’s assessment, the Claimant suffered from “severe cervical and lumbar pain associated with deep muscle injury, concern for early recurrent or new disc herniation and secondary inflammation of cervical and lumbar facet joints with associated nerve root symptoms in the arms and legs which has clearly rendered him totally disabled at present from any form of gainful employment. CX A1 at 3. He further stated that based on a reasonable degree of medical certainty, the Claimant’s lumbar and cervical condition is a direct result of the injury he sustained in Iraq in August of 2004. Id.

#### September 28, 2005 Report

In a follow-up report dated September 28, 2005, Dr. Mahoney stated that the pain the Claimant experienced in his left leg had spread to his left ankle and foot. CX A-2 at 1. He wrote that his back pain and neuropathic symptoms that were affecting his legs were worse with prolonged sitting, standing, walking, bending, twisting, or climbing. Id. He stated that the Claimant does not undertake such activities any longer due to his symptoms, which had become progressively worse. Id.

Dr. Mahoney further explained that because the Claimant’s underlying disease of the lumbar spine had stabilized and the Claimant had been able to return to work following recovery from his prior surgeries, his injury in Iraq was the major reason for his current condition. CX A-2 at 2. He stated that prior to his injury in Iraq, the Claimant was able to climb in and out of military vehicles and lift objects weighing greater than 25 lbs. Id. He had not been on any routine medication for his lower back, nor was he seeking medical attention or physical therapy on a regular basis. Id.

He expressed concern that the Claimant’s symptoms since August, 2004, were progressively worsening, and that this was especially apparent from his increasing numbness, weakness and paresthesias affecting portions of his left leg. Id. As stated in his earlier report, Dr Mahoney had hoped that he would be able to continue monitoring the Claimant’s progress while he was undergoing physical therapy. Id. However, the physical therapy was not approved and he was unable to follow through with his recommended course of treatment. Id. He stated that

there was a need to undertake further testing at this point including neurosurgical consultation, MRI testing, CT myelography of the lumbar spine and EMG nerve conduction testing in order to determine whether there is acute denervation in muscles in the legs related to his most recent back injury. Id. He stated that physical therapy and EMG nerve conduction testing had reached the level of medical necessity, and that through this testing and therapy, it could be determined whether further testing or treatment were necessary. Id.

#### November 26, 2005 Report

In his November 26, 2005 report, Dr. Mahoney again emphasized that the Claimant's condition was progressively worsening and that this condition was a direct result of his August 14, 2004 injury in Iraq.<sup>2</sup> CX A-3 at 1-2. He also stated that the Claimant had made ongoing complaints during his office visits regarding pain in his left shoulder and left-sided neck pain with pain, numbness and paresthesias into his left arm and hand. CX A-3 at 2. Dr. Mahoney had not commented on them earlier because he understood that the Claimant's primary care physician, Dr. Ronald Gomes, was monitoring that condition. Id. According to Dr. Mahoney, Dr. Gomes had requested that Dr. Mahoney's office address the Claimant's left shoulder pain at this time, which is the reason he included it in this report although he had not done so previously. Id. Dr. Mahoney stated that the Claimant was "clearly in need of an MRI of the left shoulder and of the cervical spine to help 'sort out' the left shoulder and arm symptoms in terms of the primary point of dysfunction provoking this symptomatology." Id. He explained that his symptoms were under control at that point, but that once the Claimant starts to use the extremity with "any degree of regularity," including light household work, that the symptoms would return and persist. Id. At the time of this report, Dr. Mahoney noted his understanding that the Claimant had not been approved for physical therapy or the necessary diagnostic testing. Id.

#### December 15, 2005 Report

In this report Dr. Mahoney identified the major issue as being the continued severe back pain with pain in both legs that began with the Claimant's August 14, 2004 injury in Iraq. CX A-4 at 1. Regarding an additional MRI that had been done, he stated "S/P L4-5 fusion with no evidence of recurrent/residual disc extrusion, also no change from March." Id. He further stated that it was "reassuring to know that we are not dealing with an additional or new herniation," but that the Claimant's worsening pain in his legs could be a result of instability in the lumbar spine, a condition that would not be evident on a standard MRI. Id. For this reason he ordered plain x-rays of the lumbar spine in flexion and extension, reasoning that the films could show instability causing the Claimant's pain. Id. He also prescribed a V-Lock brace, which he said would be critical to treat the Claimant's "worsening and disabling condition" relating to the lumbar spine and his August 2004 injury. CX A-4 at 2.

#### April 12, 2006 Report

In Dr. Mahoney's final report, dated April 12, 2006, he repeated his assessment that the Claimant's ongoing and worsening pain stemmed from his employment-related injury in August

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<sup>2</sup> Dr. Mahoney's reports consistently refer to an injury that took place in Iraq on August 4, 2004. Based on the Claimant's testimony and medical records, it is apparent that the injury in fact occurred on August 14, 2004.

of 2004. CX A-6 at 1. He described the Claimant's worsening pain and his own frustration at his inability to run the appropriate diagnostic tests due to the insurance carrier's refusal to cover the cost. CX A-6 at 2. He stated that the Claimant now has constant pain, which intensifies when he sits or stands for longer than 5 minutes at a time. Id. He said that the pain begins in the low back and continues into the right hip and thigh area. Id. He stated that there is also pain, although less intense, in the Claimant's left lower leg. Id. He stated that "[a]t present I feel that we are no doubt dealing with worsening instability of the lumbar spine" and that "testing at present would be directed to the question as to whether or not this area is still stable or became unstable with the August 2004 accident while I would then also question problems that might now exist at L2-3, L3-4 or even the 'level below' which would be L5-S1." Id. He maintained his position that the Claimant remains totally disabled and unable to function in any form of gainful employment. CX A-6 at 3.

Dr. James M. Gibbons, Jr.

Dr. Gibbons is an orthopedic surgeon who performed an independent orthopedic evaluation on the Claimant on February 28, 2006 at the request of the Employer and Carrier. EX B at 2. On the same date he submitted a report discussing his findings and conclusion that the Claimant's injury is not causally related to his employment related accident of August 14, 2004. Id. at 1, 5. In his report, Dr. Gibbons described the circumstances surrounding the Claimant's injury. He stated that according to the Claimant, on August 14, 2004, he injured his back while unloading a helicopter in Iraq. EX B at 2. The Claimant felt a twinge in his left shoulder and his lower back. Id. He was sent to the hospital on August 15, 2004 for x-rays, which were negative. Id. He continued his employment until March 16, 2005 when he states that he was fired and returned to the United States for that reason. EX B at 2-3. His assessment of the Claimant's 1999 back surgery was that he "ultimately did well." EX B at 3. He mentioned the MRI done upon the Claimant's return to the United States that showed "no change" and that Dr. Mahoney had referred him to physical therapy and acupuncture and prescribed Tylenol with Codeine. EX B at 3. He described the Claimant's complaints of constant pain in his back radiating down the back of both legs and an inability to sleep as a result of the pain. Id. The Claimant also described to him shooting pains into the lateral part of his left leg and that the pain is worse in the left leg than in the right. Id.

Dr. Gibbons conducted several tests during his examination of the Claimant. EX B at 4. He noted no neurological abnormalities or abnormalities relating to the cervical spine, shoulders or back. Id. He stated that the Claimant "has constant pain in his back radiating down the posterior aspects of both of his legs" but that "[h]is physical examination [on February 28, 2006] shows no objective evidence of active organic disease." EX B at 4-5. His ultimate opinion was stated as follows:

In my opinion, on August 14, 2004, the patient sprained his left shoulder and sprained his back. In my opinion, the patient has recovered from these injuries at this time. His current complaints are a manifestation, in my opinion, of his pre-existing problems that prompted an anterior inner body fusion and stabilization in 1999.

EX B at 5. He further stated that: “[i]n my opinion, [the Claimant] has currently reached a medical end result, and no further treatment is needed for the injuries that he suffered on August 14, 2004...[i]n my opinion, the patient’s prognosis is good.” Id.

### C. Other Evidence Relating to the Claimant’s Injury

The Claimant offered e-mail correspondence between him and his supervisors at Unisys as exhibits that were admitted as CX E. In an e-mail dated February 13, 2005 from the Claimant to Rodney Farmer and James P. Hayes, the Claimant requested vacation time due to problems with his shoulder and back. CX E at 1. He explained that he had hurt his shoulder and back while unloading the helicopter on his way to Habur Gate and that “both have been getting worse every day.” Id. He stated that “[i]t has gotten so bad that even with strong pain medication it’s hard to walk.” Id. On March 7, 2005, he sent an e-mail asking for clarification regarding his termination. Id. In March 9, 2005, Rodney Farmer sent the Claimant an e-mail asking for a “timeline” relating to the time off he would need to get the necessary medical treatment. CX E at 2. Mr. Farmer stated “I would like to do what is best for you, but it has to be reasonable in terms of time...” Id. On March 12, 2005, the Claimant responded to this e-mail stating that he did not have a timeline, because any medical appointments would depend on whether he was given the time off. Id. He further stated that “they may do some tests [and] want to operate ASAP as it’s worse now [than] it was before the first surgery but not as bad as the second.” Id. On March 13, 2005, the Claimant sent an e-mail to senior medic SSG Thomas R. Phillips regarding his history of back problems and his current condition. Id. An undated and unsigned e-mail was sent to Mr. Farmer formally requesting that the Claimant be terminated. Id. According to the e-mail, Major Rodney Jordan had twice expressed concern over the Claimant’s condition and opined that he was “medically unfit to continue his duties.” CX E at 3. Specifically, he stated that in one instance when his job required that he move a piece of equipment he was unable to do so. Id. There were several other e-mails between the Claimant and Mr. Farmer regarding the Claimant’s replacement and Unisys’s need to have the Claimant stay until his replacement had arrived. CX E at 3-5.

On March 23, 2005, the Claimant sent an e-mail to SSG Phillips asking for him to describe what kind of medical treatment the Claimant had received at “the Gate.” He asked if he could send “a clean e-mail saying something along the lines that I saw you a few times in regards to my back [and] shoulder.” CX E at 6. SSG Phillips responded:

The only treatment I gave you was for that cyst you had on your back and your ear. You were already taking some strong meds for your back. The only thing I could tell them is the constant pain you were in. I can give them my take on the situation. That [they] should have got you out of here a long time ago. What type of write up did they do at Mosul[?] Let me know what you need and I will see what we can do.

Id. The Claimant replied with the following e-mail, which, as discussed above, was addressed at the formal hearing during cross-examination:

Thanks for any [and] all you will do. My people at Unisys think where we are is like a base. So if you would be as kind as to say that we did talk about the back [and] shoulder [and] your take on the situation [and] any thoughts you had. When the medics that were there before you gave me some muscle relaxers and some anti inflammatory medicine. So where there was no forms I guess what I need is an e-mail stating that you were aware of what was wrong [and] monitoring the meds I was taking [and] doing what you could do to facilitate me moving on to get the medical treatment needed. If you could exaggerate a little bit on the shoulder [and] back it would be extremely helpful. Your friend in Mass.

Id. at 7. In response, SSG Phillips offered the following assessment:

I was made aware of [the Claimant's] back injury shortly after arriving here at Habur Gate. It was further aggravated by a shoulder strain. He was in constant pain even with taking some strong pain meds. Most nights he couldn't sleep through the night due to the pain. He was still doing his job. The pain and [the] stairs [were] a challenge. I could see that things were getting worse as the days went on. I did what I could to get him seen at CSH to be evaluated. [They] already have a medical history on him. He wanted to stay and do his job but the pain was too great. With any type of injury it should be dealt with ASAP. It may be a simple fix.

Id.

Sergeant Patrick S. Dove wrote a memo dated February 15, 2006 to Attorney Norton regarding the Claimant's medical condition in Iraq. CX H at 1. In the memo he states that he began sharing an office with the Claimant in August of 2004 when he arrived at Habur Gate, Iraq. Sgt. Dove was the Officer in Charge and the "mayor" of the facility. Id. He discussed the difficulties the Claimant had in performing his duties due to a lack of support and responsiveness from Unisys. CX H at 1. The Claimant also stated to him that he had back pain near the end of January, 2005. Id. According to Sgt. Dove,

[the Claimant] was in severe pain and I had to check on him constantly as well as the Soldiers and civilians that worked at the facility. Id. I mandated that he use the elevators instead of the stairwell to get around in the building, although they worked intermittently. Id. Therefore, he had to walk up and down the stairs, causing more pain and it would take several minutes to accomplish...[the Claimant] would walk to and from the site until I stopped him from doing so. Id. My Soldiers would drive him to and from the work site, but getting in and out of our military vehicles was painful as well. Id. Over time his condition worsened and he contacted Unisys requesting vacation time to see a doctor in the United States, because SGT Tighe (facility medic) could only provide him with pain relief medication...Unisys told [the Claimant] not to depart Habur Gate until he was replaced and did not acknowledge his request to depart to see a doctor. I had to mandate/order [that he leave] because of his condition and protection for himself as well as the Soldiers and other civilians at the facility...

CX H at 1-2.

#### D. Evidence Relating to the Claimant's Work Performance in Iraq

On January 5, 2005, Unisys conducted a performance review of the Claimant that covered his employment for the company during 2004. CX J at 1. His overall review rating indicated that he was "fully effective." Id. He met all of the objectives, and the review form indicated that he had "effective capability" in all of the areas where he was rated. CX J at 1-2. James P. Hayes is listed as having completed the review. CX J at 1.

On March 3, 2005 Captain Gregory Smith sent an e-mail to James P. Hayes with his assessment and that of Major Jordan and Mr. Farmer that it was best that he not return due to the Claimant's poor work performance. EX J at 35. He stated that "[a]lthough his physical capabilities may improve by whatever medical means are required, his lack of communication with MNC-I and failure to execute guidance in a timely manner make him a liability." Id.

On April 11, 2005, after the Claimant had returned to the United States, Major Jordan sent an e-mail to Mr. Farmer regarding the Claimant's work performance. EX I at 33. The e-mail was in response to a request from Mr. Farmer for comments concerning the reasons he had asked for him to be terminated. EX I at 34.

[The Claimant's] performance while serving in Iraq as a RFID Field Service Engineer was by far the worst of any of the 45 Contractors I have supporting me in the Iraq AOR. [The Claimant's] refused to send in daily reports, refused to keep Mr. Dan Moses and now Mr. Raymond Jenkins my lead MNC-I RFID FSE informed of the status of his RFID site. [The Claimant] refused to take the initiative to improve his site or increase the ITV of the area he work[ed]. Because of [the Claimant] there has been numerous times when I've had to brief MNC-I and CFLCC on the status of [the Claimant's] site with insufficient information because [the Claimant] refused/failed to report [his] daily status. [The Claimant] often left his location to go into Iraqi towns on non-RFID related missions, without permission or informing MNC-I or CFLCC. [The Claimant] on numerous occasions refused to provide requested information about his site or be proactive about repairing and requesting replacement parts for his site. Overall [the Claimant's] performance has been unacceptable and I would not have him work in the MNC-I AOR ever again. [The Claimant] was more of a problem than an asset to MNC-I and CFLCC.

EX I at 34.

#### IV. Findings of Fact and Conclusions of Law

##### A. Notice of Injury

The Employer argues that the Claimant failed to provide timely written notice of his injury that occurred on August 14, 2004, as required by section 12 of the LHWCA. Resp. Br. at 12-13. Section 12 provides,

Notice of an injury or death . . . shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury or death and the employment . . . [and] [s]uch notice shall be in writing, shall contain the name and address of the employee and a statement of the time, place, nature, and cause of the injury or death, and shall be signed by the employee or by some person . . . on his behalf.

33 U.S.C. § 912(a)-(b). The Claimant testified that he told the person who was assisting him in setting up the equipment at the site about the pain, but he admits that he did not file any written notice with Unisys until February 13, 2005, approximately six months after the incident. Therefore, it is clear that he failed to provide the Employer with timely written notice of the injury as required by sections 12(a) and (b). See *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 34 (1989). This finding, however, does not necessarily defeat the claim because section 12(d) further provides that,

Failure to give such notice shall not bar any claim under this Act (1) if the employer (or his agent or agents or other responsible officials or officials designated by the employer pursuant to subsection (c)) or the carrier had knowledge of the injury or death, (2) the deputy commissioner determines that the employer or carrier has not been prejudiced by failure to give such notice, or (3) if the deputy commissioner excuses such failure on the ground that (i) notice, while not given to a responsible official designated by the employer pursuant to subsection (c) of this section, was given to an official of the employer or the employer's insurance carrier, and that the employer or carrier was not prejudiced due to the failure to provide notice to a responsible official designated by the employer pursuant to subsection (c), or (ii) for some satisfactory reason such notice could not be given; nor unless objection to such failure is raised before the deputy commissioner at the first hearing of a claim for compensation in respect of such injury or death.

33 U.S.C. § 912(d). Since it is presumed pursuant to section 20(b) of the LHWCA, in the absence of evidence to the contrary, that an employer has been given sufficient notice of an injury, an employer bears the burden of proving by substantial evidence that it has been unable to effectively investigate some aspect of the claim due to the claimant's failure to provide adequate notice. *Steed v. Container Stevedoring Co.*, 25 BRBS 210, 216 (1991) (affirming ALJ's finding that prejudice not shown where employer had seven months before the hearing to arrange for an

independent medical exam and had access to medical records fully documenting the nature and extent of the claimant's injury). Here, the Employer contends that if the Claimant had reported his injury within 30 days of August 14, 2004, the Employer would have had an opportunity to investigate the incident and to have had the Claimant examined and treated by a physician. Resp. Br. at 13. The Employer does not provide any medical evidence or expert testimony to show that the Claimant's condition and thus his ability to work would have improved if he had been seen by a physician 30 days after his accident. Nor does the Employer provide a reason why the Claimant's untimely notice precluded it from investigating the August 14, 2004 accident. For these reasons, I find that the Employer has not met its burden of proving with substantial evidence that the Claimant's untimely notice prejudiced the Employer's investigation of his claim.

## B. Causation

Pursuant to section 20(a), a claim is presumed to fall within the LHWCA's provisions. 33 U.S.C. § 920(a). The presumption applies to the connection between a worker's accidental injury or disease and his or her employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976). To invoke the presumption, the claimant must make a prima facie showing of entitlement by "at least alleg[ing] an injury that arose in the course of employment as well as out of employment." *U.S. Indus./Fed. Sheet Metal, Inc. et al., v. Dir., OWCP*, 455 U.S. 608, 615 (1982). Specifically, this requires that the claimant establish that he or she sustained physical harm and that (1) an accident occurred in the course of employment or (2) conditions EX isted at work that could have caused the harm or pain. *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). To establish that a claim is work-related, it is not necessary for the Claimant to prove that work conditions were the primary or sole cause of the injury, but only that the employment-related injury contributed or aggravated a pre-existing condition. *Indep. Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Rajotte v. Gen. Dynamics Corp.*, 18 BRBS 85 (1986).

In order to overcome the presumption of a causal connection, the burden shifts to the employer to produce "substantial evidence" that the employee's injury was not caused or aggravated by his working conditions. *Bath Iron Works Corp. v. Dir., OWCP*, 109 F.3d 53 (1st Cir. 1997); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701 (2d Cir. 1981). Substantial evidence must be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Under this standard it is sufficient if a physician states to a reasonable degree of medical certainty that the harm suffered by the employee is not related to his employment. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39, 41-42 (2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). If the employer is successful in rebutting the presumption of a causal connection, the presumption falls out and the Claimant is left with the burden of establishing causation by a preponderance of the evidence. See *Dir., OWCP v. Greenwich Collieries*, 512 U.S. 267, 277-280 (1994).

Here, the Claimant has testified that he experienced an onset of low back and shoulder symptoms on August 14, 2004 while he was helping unload a helicopter in the course of his employment with Unisys in Iraq. He further testified that his low back pain worsened over the succeeding months while he was working at Habur Gate to the point that he could no longer

perform his job and was forced to return to the United States on March 19, 2005 for medical treatment. In addition, the Claimant's testimony that his back pain and claimed disability are connected to his employment with Unisys and, specifically, the August 14, 2004 incident while unloading the helicopter, is supported by the medical opinion from Dr. Mahoney that the Claimant's worsening and disabling low back condition is causally related to the August 14, 2004 injury. Thus, the Claimant has introduced evidence that he suffered a harm and that conditions existed in his employment which could have caused the harm. As discussed above, this is generally sufficient to make out a prima facie case of causation which invokes section 20 presumption. However, the Employer has introduced evidence in the form of the March 24, 2005 e-mail that the Claimant sent to Sergeant Phillips and the criticism of the Claimant's performance by Army officers which call his credibility into question and could be construed as suggesting that his claims of injury and disability were exaggerated and motivated by job performance problems. Therefore, the credibility of the Claimant's account must be addressed. See *Mackey v. Marine Terminals Corp.*, 21 BRBS 129, 131 (1988).

The Claimant's request that Sergeant Phillips "exaggerate a little bit" is indefensible, and the Claimant declined to offer any explanation for his conduct. In addition, his failure to seek further treatment at the military hospital in Mosul tends to undercut his claims of increasingly debilitating back pain, though it is not patently unreasonable that a civilian worker in a war zone where death is a daily event would be reluctant to burden military medical facilities with complaints of a backache. Though these considerations certainly introduce an element of doubt as to the accuracy of the Claimant's account, I am satisfied that a fair reading of the record supports his contention that he did experience worsening back pain over the course of his duty at Habur Gate. That is, Sergeant Phillips, before being solicited to exaggerate, stated that it was his observation that the Claimant was in constant pain and that it was his opinion that the Claimant should have been taken out of Habur Gate. This was corroborated by the statement from Sergeant Dove and the e-mail correspondence from Army officials stating that the Claimant was medically unfit to perform his duties. While the Employer did introduce evidence from March of 2005 that Army officials expressed dissatisfaction with the Claimant's performance for reasons that went beyond his medical problems, I place little reliance on this evidence in terms of challenging the Claimant's credibility since it post-dates his satisfactory performance review on January 5, 2005 and the initiation of his efforts during February of 2005 to be sent home from Iraq for medical treatment. In my view, the totality of evidence in this record, including the fact that there is no dispute that the Claimant did sustain harm to his body as a result of the helicopter unloading incident on August 14, 2004, corroborates the Claimant's testimony that he suffered an injury and that conditions existed in the workplace that could have caused the harm. Therefore, I conclude that he successfully invokes the statutory presumption of a causal relationship between his injury and his employment.

The burden now shifts to the Employer to rebut the presumption. The Employer offered a report completed by Dr. James M. Gibbons, an orthopedic surgeon who conducted an independent medical evaluation in this case. Upon examination of the Claimant, Dr. Gibbons acknowledged that the Claimant had sprained his left shoulder and neck in Iraq on August 14, 2004. However, he concluded that, based on a lack of objective medical evidence to indicate otherwise, that the Claimant's condition stemmed from his 1999 surgery rather than from his employment. He further opined that "no total disability was apparent" from exactly two months

after the accident because the Claimant continued working. Dr. Gibbons's ultimate conclusion was that the Claimant had reached a medical end result and that his prognosis was "good." This opinion, offered by a qualified physician who examined the Claimant, is sufficient to rebut the presumption. As a result, the presumption falls out of the case, and the Claimant is left with the burden of showing by a preponderance of the evidence that his back condition was caused or aggravated by his employment with Unisys Corporation.

Dr. Mahoney is the Claimant's treating neurologist. He has first-hand knowledge of the Claimant's 1999 and 2001 surgeries, as he referred the Claimant for surgery each time and monitored the Claimant's progress on both occasions throughout his recovery. He has similarly provided evaluation and treatment to the Claimant for his back and shoulder pain since his return from Iraq. He diligently documented the Claimant's progress through a series of five reports beginning on April 15, 2005, shortly after the Claimant's return from Iraq, up until April 12, 2006. He stated in his April 12, 2006 report that based on the progression of the Claimant's symptoms since his return from Iraq, specifically his "persistent and worsening back pain with associated bilateral leg weakness, numbness and pain," his condition involves instability of the lumbar spine which is causally related to the August 14, 2004 injury. Dr. Mahoney also explained that spiral instability would not be revealed by a standard MRI study, and he has loudly complained about the Carrier's refusal to authorize additional recommended testing and treatment. As a neurologist, he opined that the Claimant's current symptoms were a result of his injury in Iraq given that the Claimant had recovered from his earlier surgeries years prior to his employment with Unisys.

Dr. Gibbons had the opportunity to examine the Claimant on one occasion at the Employer's request, and he submitted a report dated February 28, 2006. His medical findings indicated no neurological abnormalities or abnormalities relating to the Claimant's cervical spine, shoulders, or back. He acknowledged that the Claimant had "constant pain in his back radiating down the posterior aspects of both of his legs." EX B at 5. However, he concluded,

In my opinion, on August 14, 2004, the patient sprained his left shoulder and sprained his back. In my opinion, the patient has recovered from these injuries at this time. His current complaints are a manifestation, in my opinion, of his pre-existing problems that prompted an anterior inner body fusion and stabilization in 1999.

Id. He also concluded that the Claimant was not disabled as a result of the August 14, 2004 injury because he continued to work.

In comparing these two competing expert opinions, it is obvious that Dr. Mahoney, who has treated the Claimant for several years, has a significant advantage in terms of the depth of his knowledge of the Claimant's medical history and current condition in comparison to Dr. Gibbons who only examined the Claimant once. "As a general rule, unless there are valid reasons to discount it, the opinion of a treating physician is entitled to greater weight than the opinions of one time examining physicians or consultants who have never seen the Claimant." *Lawrence v. Stevens Shipping Co.*, 2005 WL 1157128 (DOL Ben.Rev.Bd.) (2005) (citing *Auton v. Easter Gas & Fuel Corp.*, 10 BRBS 255 (1979); *Honaker v. Jewell Ridge Coal Corp.*, 12 BRBS 609,

616 (1980)). After reviewing Dr. Mahoney's detailed reports which discuss his findings on physical examination, the test results and the Claimant's history and fully explain the basis for his conclusions, I find no valid reasons for discounting his opinions. Indeed, Dr. Mahoney's reports are more thorough and persuasive in explaining the causal link between the Claimant's injury and his employment in Iraq than the contrary opinion from Dr. Gibbons who attributed the Claimant's continuing back problems exclusively to the pre-existing condition solely on the basis of his conclusion that the Claimant's continued work after August 14, 2004 demonstrates that he recovered from the effects of the August 14, 2004 injury. While it is true that the Claimant continued to work after the August 14, 2004 injury, there is as discussed above substantial evidence that he experienced significant low back symptoms which impeded his ability to carry out his job responsibilities at Habur Gate over the succeeding months. Thus, Dr. Gibbons' conclusion that the Claimant fully recovered from the August 14, 2004 injury within two months and that any ongoing low back problems are referable to the prior surgeries is inconsistent with the weight of the evidence and, consequently, unpersuasive. For these reasons, I give greater weight to the Dr. Mahoney's medical opinion and conclude that the Claimant has proved by a preponderance of the evidence that his current low back condition is causally related to his employment with Unisys.

### C. Nature and Extent of the Claimant's Disability

The LHWCA defines disability as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment . . . ." 33 U.S.C. § 902(10). The statutory definition thus encompasses a recognition of both the economic and medical effects of an injury. *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 777 (1st Cir.1979) (*Air America*). Disability under the Act involves "two independent areas of analysis -- nature (or duration) of disability and degree of disability." *Stevens v. Director, OWCP*, 909 F.2d 1256, 1259 (9th Cir.1990), cert. denied, 498 U.S. 1073 (1991).

#### 1. Nature of the Claimant's Disability – Temporary or Permanent?

The traditional measure for determining whether a disability is temporary or permanent is whether the medical evidence establishes that the injured worker has reached maximum medical improvement. *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989). Dr. Mahoney explained in his reports that the Claimant must undergo further testing and treatment before his prognosis can be determined. Specifically, he saw a need to investigate potential instability in the Claimant's lumbar region and to order further testing and physical therapy as appropriate. As previously discussed, I have credited his opinion over that of Dr. Gibbons, who did not discuss the reasoning behind his conclusion that the Claimant had reached maximum medical improvement despite acknowledging that the Claimant was in constant pain. Accordingly, contrary to the opinion of Dr. Gibbons, I find that the Claimant has not reached the point of maximum medical improvement, and therefore, that his injury is temporary.

#### 2. Extent of Disability – Total or Partial?

A three-part test has been established to determine whether a claimant qualifies for a total disability award: first, a claimant must make a prima facie case of total disability by showing she

cannot perform his former job because of job-related injury; second, if the claimant makes this showing, the burden shifts to the employer to establish that suitable alternative employment is readily available in the claimant's community for individuals with the same age, experience, and education as the claimant; and third, the claimant can rebut the showing of suitable alternative employment with evidence establishing a diligent, yet unsuccessful, attempt to obtain that type of employment. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 434 (1st Cir. 1991) (*Legrow*).

The Claimant's usual employment is the job that he was performing at the time of injury. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689, 693 (1982). Dr. Mahoney concluded in his report that the Claimant's condition was "totally disabling" and that it prevented him from being gainfully employed. Specifically, he observed that the Claimant was in constant pain and that his pain intensified if he stood or remained sitting for longer than five minutes at a time. I find that the Claimant has shown through Dr. Mahoney's medical findings and conclusions, which I have credited over the contrary opinions from Dr. Gibbons, that his job as a field service engineer in Iraq required more physical effort than he is capable of accomplishing as a result of his employment-related injury. Since a preponderance of the medical evidence thus demonstrates that the Claimant is unable to return to his pre-injury job as a field service engineer because of a work-related injury, I find that he had made out a prima facie case of total disability. *Bath Iron Works Corporation v. Preston*, 380 F.3d 597, 608 (1st Cir. 2004).

Because the Claimant has established that he is unable to return to his usual employment, the burden shifts to the Employer to establish the existence of suitable alternative employment. The Employer can meet this burden only by proving that "there exists a reasonable likelihood, given the claimant's age, education, and background, that he would be hired if he diligently sought the job." *Legrow* at 434, quoting *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-1043 (5th Cir.1981). The consideration of whether the Employer has met its burden of demonstrating the availability of suitable alternative employment must begin with a determination of the Claimant's physical and psychological restrictions based on the medical opinions of record, followed by application of those restrictions to the specific available jobs identified by a vocational expert. *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99, 103 (1985). The Employer did not introduce any vocational evidence of specific available jobs that the Claimant would be capable of performing, and it has not offered him any light duty or alternative assignment that he could perform. In the absence this evidence, I am constrained to find that the Employer has not demonstrated the availability of suitable alternative employment, and that the Claimant has established that he continues to be totally disabled as a result of the August 14, 2004 work-related back injury.

#### D. Average Weekly Wage

The Claimant contends that because he was not employed by Unisys for a full year before becoming disabled, and because he was not compensated on the basis of a 5 or 6 day work week, his average weekly wage cannot be equitably determined under section 10(a) or (b) of the LHWCA. JX 2 at 1. Instead, the Claimant argues that section 10(c) applies, allowing for his AWW to be based on his compensation while he was employed by Unisys, from May 31, 2004 until March 19, 2005, which would place the Claimant at the maximum rate of compensation under the LHWCA. JX 2 at 1-2. The Employer's attorney stated at the May 17, 2006 hearing

that the Employer did not agree that the Claimant should be entitled to the maximum benefit amount if benefits were awarded, although no specific arguments against applying section 10(c) were raised at that time. TR 13-14. The Employer's post-hearing brief did not address the applicable average weekly wage in the event that the Claimant was awarded benefits. The only wage records introduced are contained in a wage statement covering only the months that the Claimant worked for Unisys. JTX 1. These records show that the Claimant earned a total of \$84,462 during the 46 weeks that he worked for Unisys. This produces an average weekly wage of \$1,836.13. *Id.*

Section 10 of the Act provides three alternative methods for determining an injured worker's average annual earnings, which are then divided by 52, pursuant to section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing an injured worker's earning power at the time of injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp. of Baltimore*, 24 BRBS 137 (1990); *Orkney v. General Dynamics Corp.*, 8 BRBS 543 (1978); *Barber v. Tri-State Terminals*, 3 BRBS 244 (1976), *aff'd sub nom Tri-State Terminals v. Jesse*, 596 F.2d 752, (7th Cir. 1979). The determination of an employee's annual earnings must be based on substantial evidence. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991). The party contending that actual wages are not representative bears the burden of producing supporting evidence. *Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176 (9th Cir. 1976); *Riddle v. Smith & Kelly Co.*, 13 BRBS 416, 418 (1981). The claimant's testimony may be considered substantial evidence. *Carle v. Georgetown Builders*, 14 BRBS 45, 51 (1980); *Smith v. Terminal Stevedores*, 11 BRBS 635, 638 (1979). *Cf. Mattera v. M/V Mary Antoinette, Pac. King, Inc.*, 20 BRBS 43, 45 (1987) (ALJ rejected claimant's testimony due to his lack of credibility).

Section 10(a) applies only if the employee "worked in the employment in which he was working at the time of the injury whether for the same or another employer, during substantially the whole of the year immediately preceding" the injury. 33 U.S.C. § 910(a); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 821 (5th Cir. 1991); *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133, 135-36 (1990). Section 10(a) is not applicable where the injured worker was self-employed in the year prior to the injury. *Roundtree v. Newpark Shipbuilding & Repair*, 13 BRBS 862, 867 n.6 (1981), *rev'd*, 698 F.2d 743 (5th Cir. 1983), *panel decision rev'd en banc*, 723 F.2d 399, 16 BRBS 34 (CRT) (5th Cir. 1984). The evidence shows that the Claimant worked for Unisys for six weeks prior to the incident on August 14, 2004, and no evidence was introduced to show what, if any, earnings the Claimant derived from other employment during the year prior to August 14, 2004. On these facts, I find that section 10(a) does not apply because the record shows that the Decedent only worked in the employment in which he was injured for six weeks which is clearly not "substantially the whole of the year immediately preceding" the injury.

Where section 10(a) is inapplicable, section 10(b) must be considered before resorting to application of section 10(c). *Palacios v. Campbell Indus.*, 633 F.2d 840, 842-843 (9th Cir. 1980). Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for "substantially the whole of the year" within the meaning of section 10(a) prior to his injury. *Gatlin*, 936 F.2d at 821; *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336, 1342 (9<sup>th</sup> Cir. 1982), *vac'd in part on other grounds*, 462 U.S. 1101

(1983). In addition, section 10(b) looks to the wages of other workers in the same employment situation and directs that the average weekly wage be based on the wages of an employee of the same class, who worked substantially the whole year preceding the injury, in the same or similar employment, in the same or neighboring place. 33 U.S.C. § 910(b). Accordingly, the record must contain evidence of the substitute employee's wages. *Palacios*, 633 F.2d at 842-843. Here, the record contains no evidence of the earnings for the employee that was substituted for the Claimant. Because the record contains no evidence of the actual wages of employees with the Claimant's similar qualifications and employment circumstances, I find that section 10(b) does not apply. *Duncanson-Harrelson Co.*, 686 F.2d at 1341-42; *Hayes v. P & M Crane Co.*, 23 BRBS 389, 393 (1990)); *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS339, 344-45 (1988). Accordingly, I must resort to section 10(c) to determine the Claimant's average weekly wage.

Under section 10(c), the relevant factors are (1) the previous earnings of the injured employee in the employment in which he was working at the time of the injury, (2) the previous earnings of similar employees in the same class and (3) other employment of the injured worker, including self-employment. 33 U.S.C. §10(c). In applying section 10(c), the objective is to reach a fair and reasonable approximation of the injured worker's annual wage-earning capacity at the time of the injury. *Gatlin*, 936 F.2d at 823; *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991). That amount is then divided by 52, in accordance with section 10(d), to arrive at the average weekly wage. Section 10(c) determinations will be affirmed if they reflect a reasonable representation of earning capacity and the claimant has failed to establish the basis for a higher award. *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855, 859 (1982).

"Earning capacity" for purposes of section 10(c) is defined as "ability, willingness, and opportunity to work" or "the amount of earnings the claimant would have the potential and opportunity to earn absent injury." *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980). Unlike sections 10(a) and (b), subsection (c) contains no requirement that the previous earnings considered be within the year immediately preceding the injury. *Gatlin*, 936 F.2d at 823. Consideration of the probable future earnings of the claimant is appropriate in extraordinary circumstances, where previous earnings do not realistically reflect wage-earning potential. *Walker*, 793 F.2d at 321 (rejecting argument that average weekly wage should be derived from similar employee wages at time of hearing, not claimant's wages at time of accident where higher wages based on merely inflation and typical raises). The Board has allowed the consideration of probable future earnings where the injured worker was involved in seasonal employment and there was evidence of opportunities of increased work in the future. *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182, 187 (1984) (rejecting use of claimant's age and retirement plans in average weekly wage calculation); *Barber v. Tri-State Terminals*, 3 BRBS 244, 250 (1976) (holding average weekly wage calculation for seasonal worker should have been based on possible future earnings where evidence showed port business increased each of four years, similar workers earned substantially more in subsequent year, and claimant was dependable and worked whenever called), *aff'd sub nom. Tri-State Terminals v. Jesse*, 596 F.2d 752 (7th Cir. 1979). I have found that it would be inappropriate to calculate the Claimant's AWW pursuant to sections 10(a) or (b), and that I must apply section 10(c) as the only available alternative. Because the Employer provides no reason why the Claimant's proposed AWW calculation under section 10(c) is unfair, I will take into account the wages that he earned during the full 46 weeks that he was employed by Unisys in calculating his earning

capacity. Accordingly, I find that the Employer is liable for payment of temporary total disability compensation based on an AWW of \$1,836.13. 33 U.S.C. § 908(b).<sup>3</sup>

E. Medical Care

Section 7(a) of the LHWCA provides that:

The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a). The regulations implementing section 7(a) provide that medical care includes “laboratory, x-ray, and other technical services . . . recognized as appropriate by the medical profession for the care and treatment of the injury or disease.” 20 C.F.R. § 702.401. The burden is on the Claimant to establish that medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130, 1138 (1981). A claimant establishes a prima facie case for compensable medical treatment where a qualified physician indicates treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Turner v. Chesapeake and Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). If medical treatment is in part necessitated by a work-related condition, the entire cost of the treatment is compensable. *Turner*, 16 BRBS at 258. See also *Kelley v. Bureau of National Affairs*, 20 BRBS 169, 172 (1988).

Based on the credited medical opinion from Dr. Mahoney, I find that the Claimant had made out a prima facie case that the additional medical testing and treatment recommended by Dr. Mahoney constitute appropriate medical care for his work-related back injury. Since I further find that Dr. Mahoney’s medical opinion is not outweighed by the report from Dr. Gibbons, I will order the Employer to provide the medical care recommended by Dr. Mahoney.

F. Interest

As the Employer had not paid the compensation to which the Claimant is entitled under the LHWCA, he will be entitled to interest on any compensation payments that were not timely made. See *Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 625 (9th Cir.1991) (noting that “a dollar tomorrow is not worth as much as a dollar today” in authorizing interest awards as consistent with the remedial purposes of the Act). See also *Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), reh’g denied 921 F. 2d 273 (1990), cert. denied, 500 U.S. 916 (1991). The appropriate interest rate shall be determined pursuant to 28 U.S.C. § 1961 (2003) as of the filing date of this decision and order with the District Director.

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<sup>3</sup> The usual temporary total disability compensation rate under section 8(b) is two-thirds of a claimant’s average weekly wage which in the Claimant’s case would yield a compensation rate of \$1,224.09 per week. However, compensation under the LHWCA is capped at 200 percent of the National Average Weekly Wage which is determined annually by the Secretary of labor pursuant to section 6(b)(3) of the LHWCA. 33 U.S.C. § 906(b)(1). The maximum rate was 1,047.16 for the period of October 1, 2004 to September 30, 2005. See <http://www.dol.gov/esa/owcp/dlhwc/NAWWinfo.htm>.

G. Attorney's Fees

Having successfully established his right to compensation and medical benefits through the services of an attorney, the Claimant is entitled to an award of attorney's fees under section 28 of the LHWCA. See *Lebel v. Bath Iron Works*, 544 F.2d 1112, 1113 (1st Cir. 1976). The Claimant's attorney will be allowed 30 days from the date this decision and order is filed in the office of the District Director in which to file an itemized application for attorney's fees and costs. EBC will be allowed 15 days from service of the fee application in which to file any objection to the requested fees and costs.

V. Order

(1) The Employer, Unisys Corporation, shall pay the Claimant temporary total disability compensation based on an average weekly wage of \$1,836.13 commencing on June 20, 2005 and continuing until further order;

(2) The Employer, Unisys Corporation, shall pay the Claimant interest on any past due compensation at the rate applicable under 28 U.S.C. § 1961 (2003), computed from the date each payment was originally due until paid;

(3) The Employer, Unisys Corporation, shall provide the Claimant with all appropriate medical care for his work-related low back injury including the additional testing and treatment recommended by Dr. John F. Mahoney;

(4) The Claimant's attorney shall have 30 days from the date this decision and order is filed in the office of the District Director in which to file an itemized application for attorney's fees and costs, and Unisys Corporation will be allowed 15 days from service of the fee application in which to file any objection to the requested fees and costs; and

(5) All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

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**DANIEL F. SUTTON**  
Administrative Law Judge

Boston, Massachusetts